Ahmad Nazari bin Abd Majid v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 42–11 OF 2005
ZAMANI A RAHIM JC
18 MAY 2009

Criminal Law — Penal Code — s 376 — Rape — Accused convicted on victim's uncorroborated evidence — Appeal against conviction and sentence — Whether conviction was wrong — Whether identification parade was unfair and prejudiced accused — Whether trial judge erred in law and fact

Criminal Procedure — Sentence — Appeal against sentence — Rape — Inadequacy of sentence — Whether prosecution estopped from appealing on inadequacy of sentence

Evidence — Identification evidence — Turnbull guidelines — Whether there was failure to follow guidelines

The accused was charged under s 376 of the Penal Code with two separate offences of raping a 63-year old female rubber tapper ('the victim'), while she was in the rubber estate where she worked. The victim alleged that on 13 December 2000, she had just arrived by bicycle at the estate when the accused had approached her from the back, pushed her into the bushes and then proceeded to rape her. After the rape the victim's husband had arrived, consoled her and taken her home. Then again on 27 December 2000, while the victim and her husband were at the estate tapping rubber, the accused came carrying a big piece of wood. He then tried to instill fear in the victim's husband, who was old and physically weak, by chasing and threatening to hit him with the piece of wood. The accused then raped the victim in the presence of her helpless husband. During the rape the accused misled the victim by claiming that he was a Bangladeshi. The victim did not make any police reports of the rape because she was too embarrassed and did not want to be made a laughing stock. However, when the son came for a visit and learned about the rape he took his mother to lodge a police report, some 20 days after the second rape. The police conducted investigations which led to the arrest of the accused. At the identification parade, the victim picked out the accused. At the trial the victim's son-in-law gave evidence that the accused had approached him to negotiate a settlement over the rape he had

committed and had duly handed over to the latter his business card. The accused was acquitted and discharged in respect of the first charge at the close of the prosecution case but the defence was called in respect of the second charge. For his defence on the second charge the accused elected to give an unsworn statement from the dock. In his defence the accused denied meeting the victim and claimed that it was a case of mistaken identity and that the victim had wrongly identified him. The accused also denied approaching the victim's son-in-law to negotiate a settlement and explained that his business cards which were widely distributed could have been picked up from anywhere. The accused's defence did not find favour with the trial judge and the accused was found guilty, convicted and sentenced to eight years imprisonment with two strokes of whipping. Dissatisfied with the conviction and sentence the accused appealed. The prosecution too appealed against the inadequacy of the sentence passed. In his grounds of appeal the accused cited, inter alia, that the prosecution had failed to lead evidence to corroborate the victim's allegation of rape; that the identification parade was unfair to the accused and the subsequent identification in court was of little significance; that the trial judge had erred in law and in fact in calling the accused to enter his defence in respect of the second charge of rape when all that was before the court was the victim's bare allegation. In respect of the sentence, the defence submitted that as the prosecution had not laid down the foundation meriting a deterrent sentence it was now estopped from appealing on the inadequacy of sentence.

Held, dismissing the accused's appeal, and allowing the prosecution's appeal by substituting original sentence with a term of imprisonment of 14 years to commence from date of judgment and six strokes of whipping:

(1) A conviction based on uncorroborated evidence is not wrong in law but the trial judge ought to warn himself on the danger of conviction based on such uncorroborated evidence. In the instant case the trial judge had noted in her grounds of judgment that she had cautioned herself on the absence of corroboration and went on to find that there was no reason for the victim who had not known the accused to make a false allegation against him. Thus there was no merit in the accused's submission on the issue of corroboration (see paras 9–11).

(2) Although the accused had submitted that the identification parade was unfair to the accused it had not shown in what way it had prejudiced the accused. The prosecution had adduced evidence to show that the participants of the parade were made up of members of the public and inmates from the lock-up; that the procedures laid out in the Inspector General Standing Order had been complied with; and that the victim had positively identified the accused as the man who had raped her on

the second occasion. Although the Turnbull guidelines are not on all fours applicable to the facts of this case, they are just guidelines and must not be taken as religious rituals that must be observed at all cost. In this case, the victim's evidence on the identity of the accused was not made at some distance in poor light impeded by obstacles but while the victim and the accused were in very close physical contact. Thus the accused's argument of no case to answer as the identification of the accused was unreliable had no merit. In any case the trial judge had been satisfied with the evidence of identification of the accused as the person who raped the victim (see paras 15 & 21).

(3) From the trial judge's notes it was clear that she had subjected the victim's credibility to a maximum evaluation before she accepted the victim's evidence. It was also clear that she had believed the victim's son-in-law when he said it was the accused who had given him the business card to effect a settlement of the case. As such, a prima facie case had been made out at the close of the prosecution's case and the accused was rightly called upon to make his defence in respect of the second charge. In the case of such positive findings on credibility of witnesses, the appellate court which did not have the benefit of the audio-visual advantage of seeing and hearing the witnesses enjoyed by the trial judge, should be slow to interfere (see paras 27–28).

(4) As regards sentence, the court took judicial notice of the rampancy of rape these days and pointed out that besides submitting that the prosecution was estopped from appealing the defence had not advanced any mitigating factors. However based on the mitigating factors advanced by the accused in the court below, the aggravating factors in the instant case, and the trial judge's opinion at the end of her judgment it was held that the sentence was lenient and therefore ought to be enhanced (see paras 37, 42–43).

[Bahasa Malaysia summary

Tertuduh dituduh di bawah s 376 Kanun Keseksaan dengan dua kesalahan berasingan, merogol seorang perempuan, penoreh getah, berumur 63 tahun ('mangsa'), sewaktu dia berada di ladang getah di mana dia bekerja. Mangsa mengatakan bahawa pada 13 Disember 2000, dia tiba dengan basikal di ladang tersebut apabila tertuduh menghampirinya dari belakang, menolaknya ke dalam belukar dan seterusnya merogolnya. Selepas kejadian rogol tersebut suami mangsa tiba, memujuk dan membawanya pulang. Seterusnya sekali lagi pada 27 Disember 2000, apabila mangsa dan suaminya berada di ladang menoreh getah, tertuduh datang membawa sebatang kayu yang besar. Dia kemudiannya cuba menakutkan suami mangsa, yang sudah tua dan secara fizikalnya lemah, dengan mengejar dan mengugut untuk memukulnya

dengan kayu tersebut. Tertuduh kemudiannya merogol mangsa di hadapan suaminya yang tidak berdaya. Semasa kejadian rogol tersebut tertuduh telah menipu mangsa dengan mengatakan bahawa dia seorang bangsa Bangladesh. Mangsa tidak membuat sebarang laporan polis berkenaan kejadian rogol tersebut kerana dia malu dan tidak mahu dijadikan bahan ketawa. Walau bagaimanapun, apabila anak lelakinya datang melawat dan mengetahui kejadian rogol tersebut dia membawa ibunya untuk membuat laporan polis, 20 hari selepas kejadian rogol kali kedua. Polis menjalankan siasatan yang membawa kepada penangkapan tertuduh. Semasa perbarisan cam, mangsa mengecam tertuduh. Semasa perbicaraan menantu mangsa memberi keterangan bahawa tertuduh telah berjumpa dengannya untuk membincangkan penyelesaian terhadap rogol yang dilakukannya dan memberikannya kad perniagaannya kepadanya. Tertuduh dibebaskan dan dilepaskan tuduhan pertamanya pada penutupan kes pendakwaan tetapi disuruh membela diri terhadap tuduhan kedua. Untuk pembelaannya ke atas tuduhan kedua tertuduh memilih untuk memberikan kenyataan tidak bersumpah di kandang orang salah. Dalam pembelaannya tertuduh menafikan berjumpa dengan mangsa dan mendakwa bahawa kes ini merupakan silap identiti dan bahawa mangsa telah tersilap dalam mengenalpastinya. Tertuduh juga menafikan berjumpa dengan menantu mangsa untuk membincangkan penyelesaian dan menerangkan bahawa kad perniagaannya yang diberikan secara rambang boleh diambil di mana-mana sahaja. Pembelaan tertuduh tidak diterima oleh hakim perbicaraan dan tertuduh didapati bersalah, disabitkan dan dijatuhkan hukuman penjara 8 tahun dengan dua kali sebatan. Tidak berpuas hati dengan sabitan dan hukuman tertuduh merayu. Pihak pendakwaan juga merayu terhadap ketidakcukupan hukuman yang dijatuhkan. Dalam alasan rayuannya tertuduh mengatakan bahawa pihak pendakwaan telah gagal untuk mengemukakan keterangan untuk menyokong tuduhan rogol mangsa tersebut; bahawa perbarisan cam tidak adil kepada tertuduh dan pengenalan di dalam mahkamah hanya mempunyai kepentingan yang kecil; bahawa hakim perbicaraan khilaf dalam undang-undang dan dalam fakta ketika memanggil tertuduh untuk memasukkan pembelaannya berkenaan tuduhan rogol yang kedua berdasarkan tuduhan mangsa semata-mata. Berkenaan hukuman, pihak pembelaan mengemukakan bahawa memandangkan pihak pendakwaan tidak menyatakan asas yang membawa merit kepada hukuman deteren maka mereka telah diestop daripada merayu terhadap ketidakcukupan hukuman.

Diputuskan, menolak rayuan tertuduh, dan membenarkan rayuan pihak pendakwaan dengan menggantikan hukuman asal kepada penjara selama 14 tahun bermula dari tarikh penghakiman dan enam kali sebatan:

(1) Sabitan berdasarkan keterangan yang tidak disokong tidak salah dalam

undang-undang tetapi hakim perbicaraan perlu memberi amaran kepada dirinya tentang bahaya membuat sabitan berdasarkan keterangan tanpa sokongan tersebut. Dalam kes ini hakim perbicaraan telah mencatatkan dalam alasan penghakimannya bahawa dia telah memberi amaran kepada dirinya mengenai ketiadaan sokongan dan mendapati bahawa tiada sebab untuk mangsa tersebut membuat tuduhan palsu ke atas tertuduh yang tidak dikenalinya. Oleh itu tiada merit dalam penghujahan tertuduh atas isu sokongan (lihat perenggan 9–11).

(2) Walaupun tertuduh telah menghujah bahawa perbarisan cam tidak adil terhadap tertuduh, ia tidak menunjukkan bagaiman perbarisan cam tersebut memprejudis terhadap tertuduh. Pihak pendakwaan telah mengemukakan keterangan untuk menunjukkan bahawa orang yang menyertai perbarisan tersebut terdiri daripada orang awam dan banduan-banduan dari lokap; bahawa prosedur yang dinyatakan dalam Perintah Tetap Ketua Polis telah dipatuhi; dan bahawa mangsa secara positif telah mengenalpasti tertuduh sebagai lelaki yang merogolnya pada kejadian kedua. Walaupun keempat-empat garis panduan Turnbull tidak digunakan kepada fakta kes ini, ia hanyalah garis panduan dan tidak boleh dianggap sebagai ritual keagamaan yang perlu dipatuhi setiap masa. Dalam kes ini, keterangan mangsa mengenai identiti tertuduh tidak dibuat di suatu tempat yang jauh dalam keadaan tidak cukup terang dan dihalang objek tetapi dibuat ketika mangsa dan tertuduh berada dalam keadaan fizikal yang rapat. Oleh itu pertikaian tertuduh untuk tiada kes untuk dijawab merujuk kepada perbarisan cam tersebut tidak boleh dipercayai adalah tanpa merit. Dalam kes ini hakim perbicaraan telah berpuas hati dengan keterangan pengenalan tertuduh sebagai orang yang merogol mangsa (lihat perenggan 15 & 21).

(3) Daripada catatan hakim perbicaraan adalah jelas bahawa dia telah mempertimbangkan kredibiliti mangsa pada penilaian yang maksima sebelum dia menerima keterangan mangsa. Adalah jelas bahawa dia juga mempercayai menantu mangsa apabila dia mengatakan bahawa tertuduh yang memberikan kad perniagaannya untuk membuat penyelesaian kes tersebut. Oleh itu, kes prima facie telah dibuktikan pada penutupan kes pendakwaan dan tertuduh dengan betul dipanggil untuk membuat pembelaannya berkaitan tuduhan kedua. Dalam kes yang mana terdapat dapatan positif ke atas saksi-saksi mahkamah rayuan, hakim perbicaraan yang tidak mempunyai faedah melihat secara audio-visual dan mendengar saksi, tidak perlu campur tangan terlalu kerap (lihat perenggan 27–28).

(4) Berkenaan hukuman tersebut, mahkamah membuat notis kehakiman mengenai kekerapan kejadian rogol sekarang dan menunjukkan bahawa

selain mengemukakan bahawa pihak pendakwaan diestop daripada merayu, pihak pembelaan tidak mengemukakan sebarang faktor mitigasi. Walau bagaimanapun berdasarkan faktor mitigasi yang dikemukakan oleh tertuduh di mahkamah, faktor-faktor pemberatan dalam kes ini, dan pendapat hakim perbicaraan pada penutup penghakimannya, diputuskan bahawa hukuman tersebut adalah terlalu ringan dan oleh itu harus ditambah (lihat perenggan 37, 42–43).]

Notes

For a case on Turnbull guidelines, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1722.

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.

For cases on s 376 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1693–1718.

Cases referred to

Aziz bin Muhamad Din v PP [1996] 5 MLJ 473, HC (refd)
Chiu Nang Hong pp [1965] 1 MLJ 40, PC (refd)
Erivesto Anderson & Anor v PP [2009] 1 MLJ 593; [2009] 2 AMR 477, FC (refd)
Hairani Sulong v PP [1993] 2 CLJ 79, HC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)
Ng Yau Thai v PP [1987] 2 MLJ 214, SC (refd)
People's Insurance Company (M) Bhd, The v Ting Tiew Kiong [2007] 5 MLJ 624; [2007] 5 CLJ 225, CA (folld)
PP lwn Tan Chee Kern dan satu lagi [2001] MLJU 557; [2002] 1 CLJ 210, HC (refd)
PP v Mardai [1950] MLJ 33, HC (refd)
PP v Mohamed bin Majid [1977] 1 MLJ 121, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Wan Marzuki bin Wan Abdullah [2009] 1 AMR 77, CA (refd)
PP v William Ayau [2005] 4 MLJ 328, HC (refd)
R v Billam [1986] 1 All ER 985, CA (refd)
R v Roberts [1982] 1 All ER 609, CA (refd)
R v Turnbull & Ors [1977] QB 224, CA (refd)

Legislation referred to

Penal Code s 376
Penal Code (Amendment) Act 2003
Police Act 1967

Harpal Singh (Harpal Singh & Co) for the appellant.
Ridha Abdah Subri (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zamani A Rahim JC:

THE CHARGES

[1] The accused was charged with two separate offences of rape under s 376 of the Penal Code. The first charge reads as follows:

> Bahawa kamu pada pada 13hb Disember 2000 di antara jam 7.00 pagi hingga 8.00 pagi, di dalam kawasan kebun getah Pinang Tunggal, Tikam Batu, di dalam Daerah Kota Kuala Muda, di dalam Negeri Kedah Darul Aman, telah merogol seorang perempuan Hong Cheng Heok, Kad Pengenalan 381024-02-5168. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[2] The second charge reads as follows:

> Bahawa kamu pada 27hb Disember 2000 di antara jam 7.00 pagi hingga 8.00 pagi, di dalam kawasan kebun getah Pinang Tunggal, Tikam Batu, di dalam Daerah Kota Kuala Muda, di dalam Negeri Kedah Darul Aman, telah merogol seorang perempuan Hong Cheng Heok, Kad Pengenalan 381024-02-5168. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[3] The accused was acquitted and discharged in respect of the first charge at the close of the prosecution case. The defence was called in respect of the second charge.

[4] At the conclusion of the whole trial, the accused was found guilty, convicted and sentenced to eight years imprisonment term with effect from 29 June 2005 and two strokes of whipping.

[5] Dissatisfied with the conviction and sentence, the accused appealed. The prosecution too, appealed against inadequacy of sentence.

[6] The victim was raped twice within a span of two weeks on 13 December 2000 and 27 December 2000 respectively. The facts of how the two rapes occurred were summarised by the learned sessions court judge (trial judge) in her grounds of judgment at pp 16 and 17 of the appeal record are as follows:

The alleged victim was a female rubber tapper. According to her, on the 13 December 2000, she had arrived at her estate at about 7am. As she was placing her bicycle at a small hut within the estate someone approached her from the back and covered her face. The said person then closed her mouth with one of his hand and then with the other hand, pulled her hand to her back and pushed into the bushes. The man then used his knee to push against her body before removing her long pants and undergarment. He then proceeded to rape her for about five to ten minutes by inserting his private part into hers. After the rape, he went away, her husband arrived, consoled her and took her home.

More or less two weeks later, when she was again at the estate tapping rubber with her husband, the man came back. This time he carried a big piece of wood and tried to hit her husband. As he was unable to fight back, her husband ran towards her to escape the man. The man gave chase but upon seeing her, the said man dragged her into the bushes. He, then, took her knife and removed the rubber scrap container that was tied to her body before proceeding to rape her. Her husband who was at the scene witnessed the rape but was no match against the rapist physically and was, thus, unable to help her. Again after the rape, the man walked off. Her husband urged her not to cry but to try to remember her assailant. She obeyed. They then went home but they did not make any police report as she was too embarrassed and felt that she would be the laughing stock if people were to know of the incidents.

When Chinese New Year arrived, her son came home and it was then she recounted the incidents to him. He then took her to lodge a police report. That was about approximately 20 days after the second incident. The police conducted investigations and the accused was arrested. At the identification parade, the complainant picked up the accused.

[7] There are several grounds listed in the petition of appeal and for the purpose of these appeals I propose to divide them under the following headings:

(1) Corroboration of rape;

(2) Identification of the accused;

(3) Credibility of the victim;

(4) Proposed settlement of the case by the accused;

(5) Defence; and

(6) Inadequacy of sentence.

I shall now propose to deal with each of the headings in turn.

CORROBORATION OF RAPE

[8] Learned counsel submitted that the prosecution has failed to lead

A evidence on corroboration. It was stated in *Public Prosecutor v Mohamed bin Majid* [1977] 1 MLJ 121 that:

(a) in a prosecution for rape it was unsafe to convict unless there is corroboration on the allegation of rape and corroboration on the identification of the assailant.

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(b) the identification parade was unfair to the accused and the subsequent identification in court was of little significance.

[9] It was also stated in *Public Prosecutor v Mardai* [1950] MLJ 33 that C 'whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated, nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story'. However, a conviction D based on uncorroborated evidence is not wrong in law or not illegal: *Aziz bin Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473. But the trial judge must warns himself or herself of the danger of conviction based on such uncorroborated evidence. As to warning, it must be borne out in the grounds of judgment and no particular form of words is necessary for this purpose, E what is necessary is that the judge's mind upon the matter should clearly be revealed, see *Ng Yau Thai v Public Prosecutor* [1987] 2 MLJ 214 and *Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40.

[10] In the instant case, on the question of corroboration in a rape case, this F is how the trial judge put it in her ground of judgment at p 18 of the appeal record.

> The rationale for the need of corroboration in a rape case is the fear that an innocent victim may be framed as an allegation of rape is easily made but difficult G to deny. Although this rule of prudence has evolved to be a rule of law, it does not mean that the court cannot convict an accused in the absence of corroboration; it suffices if the court *cautions* itself of the danger of the absence of corroboration when making the decision.

H **[11]** She went on to say at p 19 of the appeal record:

> I *cautioned* myself on the absence of corroboration and noted that the accused is not known to the complainant. Thus, there is no reason for the complainant to make a false allegation against the accused.

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[12] Learned counsel also took exception for the delay in lodging a police report — 3 weeks after the incident of the second rape. However in *Hairani Sulong v Public Prosecutor* [1993] 2 CLJ 79, Richard Malanjum JC (as he then was) said; 'in my view delay in reporting an offence such as rape should not

be taken as evidence of concoction without more. The reason for the delay should be considered in the light of the other relevant and admissible evidence available before coming to any conclusion'.

[13] Now let us examine the reason for the delay in reporting the offence in this case. At p 18 of the appeal record, the learned trial judge wrote:

> While I concede that as a general rule, speed is of the essence in lodging a rape report, the facts in this case can be distinguished. The complainant is illiterate and does not know the law and she was very embarrassed by the rapes and chose to remain silent about the two incidents. It was only on the advice of her son that she went to lodge the report. Thus, the delay in lodging the report is acceptable.

[14] Accordingly, on the facts and circumstances of this case, I did not find any merit in learned counsel's submission on the issue of corroboration.

IDENTIFICATION OF THE ACCUSED

[15] Learned counsel submitted that the identification parade was unfair to the accused. The evidence relating to the parade was unsatisfactory. The participants of the parade were made up of members of the public and from the lockup. It was not shown in what manner it had prejudiced the accused. According to PW2 who conducted the parade, he complied with the procedures as laid out in the Inspector General Standing Order, commonly known in the police circle in its short form as 'IGSO'. The IGSO is presumably made pursuant to the Police Act 1967. The victim inspected the parade, she stopped in front of the accused. She identified the accused eyes. The eyes had peculiar characteristics. Both the cornea were said to have double lines. In addition, she was further positive of the accused involvement after having observed the accused hand. Having done that, the victim positively and affirmatively identified the accused as the man who raped her on the second occasion.

[16] Another complaint was that the accused was wearing a red shirt at the time the parade was held, while the rest of the participants were not. This grievance raised by the accused was devoid of merit. The red shirt worn by the accused was not in any way assisted the victim in identifying the accused. I share the view of the learned trial judge on this issue when she said:

> I am of the view a difference in the colour of the shirt itself is not detrimental to the legality of the parade as there was no evidence to show that the other participants wore a uniformed coloured shirt to the exclusion of the accused. Further what is material is PW2 had ascertained from the accused whether the latter had any objections to the identification parade and the latter had said that he agreed to the identification parade in the manner and mode held.

[17] Learned counsel also complained the victim's identification of the accused as her rapist. In her police report, the victim said the person who raped her on the second occasion on 27 December 2000 was a Bangladeshi. The medical report, P7 too stated that she was allegedly raped by Bangladeshi man. The victim said so because the rapist told her that he was a Bangladeshi. The victim merely echoed the same in her police report, P2 and medical report, P7 that the rapist was allegedly a Bangladeshi. But the investigation turned out that the accused was actually the rapist. The accused attempted to deceive and confused the victim.

[18] Learned counsel also questioned the credibility of the victim as to her ability to identify the accused, while the late husband (since died) who had witnessed the second incident of rape could not. I too associate myself with the view expressed by the learned trial judge on this point when she said 'learned counsel's argument has no merit as various witnesses have various abilities and the complainant should not be faulted merely because she is a better witness than her late husband'. Indeed every person is endowed with various power of observations and recollections. Some can remember better than the others over the same incident. As for the victim, this was the second encounter of rape. The victim had the opportunity to see the accused at a very close range. She caught hold of the accused hand. The rape incident lasted for a considerable duration of time about five to ten minutes. Immediately after the rape, her late husband came to console her not to cry. He urged her to remain calm, looked hard and to remember the identity of the rapist, to which she did.

[19] On the subject of identification, learned counsel also submitted that the identification process was a nullity according to the guidelines set out in *R v Turnbull & Ors* [1977] QB 224. Lord Widgery CJ said as follows:

> Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court to reduce that number as far as possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to the juries in the way indicated in this judgment.
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> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury on the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken ...

Continuing at p 552 the court said: A

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? ... Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. B C

Continuing further the court said:

> All these matters go to the quality of the identification evidence. If the quality is good and remains food at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it, provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur ... D E
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> When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification ... F
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> A failure to follow these guidelines is likely to result in a conviction quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe. G

[20] On the application of *Turnbull* guidelines, Alauddin Mohd Sheriff CJ (Malaya) (as he then was) in *Erivesto Anderson & Anor v Public Prosecutor* [2009] 1 MLJ 593; [2009] 2 AMR 477 referred the case of *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65 where the Court of Appeal remarked as follows: H

> Now, the English case of *Turnbull* did not lay down any proposition of law embodied in concrete. As all members of the criminal bar are aware, the several propositions in *Turnbull* are known as the '*Turnbull guidelines*'. And this is what they really are. They are just guidelines and each case depends on its own facts. What was said in *Turnbull* does not amount to inflexible rules with no exceptions whatsoever. I

[21] The *Turnbull* guidelines are not on all fours applicable on the facts of this case. At any rate, they are just guidelines and must not be taken as religious rituals that must be observed at all cost. In this case, the victim's evidence on the identity of the accused was not made at some distance in poor light impeded by obstacles. As stated earlier, there was very closed physical contact between the victim and the accused, though the latter's face below both eyes was masked. Thus, learned counsel's argument of no case to answer as the identification of the accused was unreliable has no merit. The learned trial judge was satisfied with the evidence of identification of the accused as the person who raped the victim. The trial judge said as follows:

> Initially the complainant said that she was able to identify the accused of the flesh at the accused's arms. With this, I was ready to dismiss the charges against the accused. However, later evidence revealed that she was able to identify him by his eyes and the manner in which the accused walked. According to her, at the time of the second rape, her husband urged her not to cry but to try to look hard and to remember the identity of the accused. Thus, she focused her attention on the accused and informed the court that she was certain it was the accused who had raped her as she could see that the accused walked in the same particular manner the rapist in accused had walked. After she described the manner in which the accused walked, learned defence counsel challenged her to again view the said walking gait in court to which the complainant retorted that having heard her evidence, the accused would have changed his manner of walking. I agree with the complainant's retort.

[22] The learned trial judge continued in the subsequent paragraph as follows:

> Like circumstantial evidence, the various evidence on identification in this case by themselves cannot stand but taken and viewed as a whole, I am of the view that the evidence is sufficient to order the accused to answer the charge against him. I also have had the opportunity to witness the demeanor of the complainant. She is not exactly the easiest witness and tends to be rather lengthy when she testifies. However, I find her to be a very honest and reliable witness. When confronted with certain questions, she takes time to consider and informs the court whether or not she knows the answer. I believe her when she states that she is certain of the identity of the accused and had she not been sure she would not have wronged the accused. However she had admitted that she was not too sure of the identity of the accused in the first incident as the rape was so sudden and unexpected. Accordingly, the existence of this doubt should be exercised in the accused's favour and so I directed him to be acquitted and discharged in respect of the first charge. But as the complainant is certain of the identity of the rapist in the second charge, I made an order that he should answer the said charge.

[23] I too, found learned counsel attack on poor identification of the accused was devoid of merit.

CREDIBILITY OF THE VICTIM

[24] Learned counsel further submitted that the trial judge was seriously wrong in law and in fact in calling the accused's defence because all that was before the court was a bare allegation. The prima facie test of 'maximum evaluation of the credibility of witnesses as approved in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 at p 107 was not done. The material witness in this case is obviously the victim. On her reliability and credibility this is how the learned judge described in her judgment.

> I also have had the opportunity to witness the demeanour of the complainant. She is not exactly the easiest witness and tends to be rather lengthy when she testifies. However, I find her to be a very honest and reliable witness.

(at p 21 of the appeal record)

[25] In addition to the above finding, a question was put to the victim in the course of cross-examination that she could not identify the accused to which she replied; 'Orang yang susah hati selalu akan ingat dan cam'. What it means is this. As she was victimised, she would always remember and would be able to identify (ie the rapist). Immediately after her reply, the trial judge noted as follows:

> Mahkamah: Saksi ini kelihatan tegas, konsisten, thoughtful and very certain of herself.

(at p 40 of the appeal record)

[26] And in re-examination, the victim admitted that she could not identify the person in the first rape. She, however, could identify the accused in the second rape. On this contrast of evidence, the trial judge wrote:

> Mahkamah: Honest witness who admits what she knows and admit what she does not know.

(at p 40 of the appeal record)

[27] It is clear that the trial judge had subjected the victim's credibility to a maximum evaluation within the *Looi Kaw Chai & Anor*'s principle before she accepted her evidence. The trial judge too believed the evidence of PW4 when he said it was the accused who had given him the business card to effect a settlement of the case (at p 23 of the appeal record). Thus, a prima facie case

had been made out at the close of the prosecution and the accused was rightly called upon to make his defence in respect of the second charge.

[28] With the above positive findings on credibility of witnesses, I hold that the appellate court, as I am now, should be slow to interfere with such findings as I do not have the benefit of the audio-visual advantage of seeing and hearing witnesses that are enjoyed by the trial judge. In the Court of Appeal case of *Public Prosecutor v Wan Marzuki bin Wan Abdullah* [2009] 1 AMR 77, Gopal Sri Ram JCA (as he then was) said:

> There is clear authority for the proposition that in an appeal of this nature which turns on questions of fact particularly in relation to issues of *credibility*, this court will be reluctant to interfere with the findings made by the primary trier of fact. We need go no further than to quote the following passage from the judgment of Shaik Daud JCA in *Andy b Bagindah v Public Prosecutor* [2000] 3 AMR 2611; [2000] 3 MLJ 647:
>
> > In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the *credibility of witnesses*, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[29] Similarly in the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, Gopal Sri Ram JCA (as he then was) said:

> Now, it is settled law that it is no part of the function of an appellate court in a criminal case or indeed any case — to make its own findings of fact: That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantages enjoyed by the trial court.

[30] In similar vein in the Court of Appeal case of *The People's Insurance Company (M) Bhd v Ting Tiew Kiong* [2007] 5 MLJ 624; [2007] 5 CLJ 225 it was held:

> The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that these findings are clearly wrong. And it is even more undesirable to do so where the conclusion reached, to a large extent, depended on the *credibility of the witnesses* and the impression formed by the trial judge who has seen them and judged their honesty and accuracy (see Federal Court case of *China Airlines Ltd v Malta Air Corporation Sdn Bhd & Another Appeal* [1996] 3 CLJ 163). We adopt the same in deciding this appeal.

I, too, approach and adopt the same in this appeal.

PROPOSED SETTLEMENT OF THE CASE BY ACCUSED

[31] PW4 is the son-in-law of the victim. According to PW4 while the trial was pending, the accused had approached him in the court compound and requested him to act as middle man to talk to the victim with a view to settle the case out of court. The accused duly handed PW4 the accused's business card, P3 with his name, address and hand phone number thereon so that PW4 could contact the accused. PW4 said he did approach the victim and made known to her of the accused's proposition. The victim, however, rebuffed at the idea of the settlement of the case. This evidence indicates that the accused was haunted with guilty mind in respect of the rape charges preferred against him.

DEFENCE

[32] Having called for his defence on the second charge, the accused elected to give a statement from the dock reading a typed written statement, D11. It was unsworn. Its evidential value is not the same as that of evidence given on oath as stated by Low Hop Bing J in *Public Prosecutor lwn Tan Chee Kern dan satu lagi* [2001] MLJU 557; [2002] 1 CLJ 210 at p 220 as follows:

> Saya bersetuju dengan keputusan yang dibuat oleh *Chang Min Tat H* dalam *Ng Hoi Cheu* ... Mahkamah Rayuan dalam *Udayar Alagan*, dan akhirnya Mahkamah Rayuan dalam *Juraimi dan Mohd Affandi*, ... dan mencapai kesimpulan bahawa kenyataan tidak bersumpah dari kandang tertuduh boleh diterima masuk sebagai keterangan, dan diberi penilaian sewajarnya tetapi bukan dengan keberatan yang setaraf dengan keterangan bersumpah.

[33] In his defence the accused denied ever meeting the complainant, much less raped her. His defence was that of a mistaken identity in that the victim had wrongly identified him. Learned counsel regurtitated the issue of identification and corroboration which had been canvassed extensively and dismissed by the learned trial judge at the close of the prosecution case. The accused also denied ever approached PW4 to negotiate a settlement and his business cards were widely distributed, PW4 could have pick up from anywhere. The accused's defence did not find favour with the learned trial judge. Her decision at the end of the trial is produced below:

> I reconsidered the submissions and concluded that there was no necessity to change my decision in respect of the issue on identification and corroboration. I considered the accused's denial of the attempted settlement and his explanation as regards his business card. The parties are not known to each other and there was no reason for the complainant and PW4 to make such concerted and active moves

to frame the accused in that they had taken steps to obtain the accused's business card for the mere purpose of framing the accused. As such, I believe PW4 when he said that it was the accused who had given him the business to effect a settlement.

[34] The accused's statement from the dock is not subjected to cross-examination and he takes this course at his own peril, as this case is dependent, to a large extent, on the victim's credibility. The accused's credibility and veracity is vital but unfortunately he throws away the opportunity to be tested. The trial judge made a finding that she did not believe the accused defence and the defence has, therefore, failed to cast any reasonable doubt as to his guilt or on the truth of the prosecution case. The prosecution has, therefore, proved its case beyond reasonable doubt: see the contemporaneous records at p 74 of the appeal record. The accused was sentenced to an imprisonment term of eight years and two strokes of whipping.

[35] Based on the grounds stated above, I, therefore, dismissed the accused's appeal against conviction.

INADEQUACY OF SENTENCE

[36] As regard the prosecution appeal on an inadequacy of sentence, the learned counsel had referred to p 74 of the appeal record where the prosecuting officer submitted on the following terms: 'pohon hukuman yang setimpal. Tiada kesalahan lalu'. Learned counsel argued that the prosecution had not laid down the foundation meriting a deterrent sentence. Therefore, the prosecution is now estopped from appealing on the inadequacy of sentence. No authority was advanced to support this contention. Learned counsel prayed that the sentence imposed by the trial judge should not be disturbed. The learned deputy, however, submitted that the sentence of eight years imprisonment term and two strokes of whipping was manifestly inadequate as it did not appear that public interest had been taken into account. One of the ways to uphold public interest is to pass a deterrent sentence — a deterrent not only to the accused but also to the other persons who have similar propensities. The court, being the last bastion of justice, must show public abhorrence or revulsion against the crime of rape. This may be done by way of imposing severe punishment on the rapist.

[37] Rape is rampant nowadays. I take judicial notice of its rampancy. Certainly, it demands immediate custodial sentence. But its length must depend on the facts and circumstances of each individual case. Where the rape is accompanied with violence, committed by virile man on defenseless young girl or on an elderly lady commonly known in Bahasa Malaysia as

'warga emas', the rapist deserves, not only a long imprisonment term, but whipping as well. In the *Public Prosecutor v William Ayau* [2005] 4 MLJ 328, OKT was sentenced to five years imprisonment term after the trial judge took into account (a) the plea of guilty by OKT, (b) OKT was a young offender, aged 19 years, (c) OKT was married with a child and wished to raise his family responsibly, and (d) OKT had repented. In reversing the sentence, the High Court enhanced the sentence to 15 years and five rotans and observed as follows:

> On top of that it is a rape on a school girl of 13 years old ... It is unfortunate that although the seriousness of the offence was appreciated by the learned sessions court judge, the sentence of imprisonment of five years does not reflect the society's abhorrence but would instead deprecate the seriousness of the crime ... There had been an especially dramatic rise in reported rape cases in the country ...

[38] Rape is undeniably a serious offence. The Legislature deem it fit to enhance the punishment of rape from 20 years to 30 years vide Penal Code (Amendment) Act 2003. And its minimum term of imprisonment is still maintained at five years. In *Hairani Sulong v Public Prosecutor* [1993] 2 CLJ 79, Richard Malanjum JC (as he then was) cited the English case of *R v Roberts* [1982] 1 All ER 609 where Lord Lane CJ made an observation on the purpose and form of punishment for an offence of rape which equally applicable in our jurisdiction, at p 610 as follows:

> Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second to emphasise pubic disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.
>
> Some of the features which may aggravate the crime are as follows. Where a gun or a knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury (whether that is mental or physical). Where violence is used over and above the violence necessarily involved in the act itself. Where there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or *elderly*. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed series of rapes on different women, or indeed on the same woman.

[39] In another judgment of Lord Lane CJ in *R v Billam* [1986] 1 All ER 985 with regard to the length of imprisonment term to be inflicted on an offender in a rape case is not easy to lay down guidelines. At p 987 he said:

> The variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of years. That aspect of the problem was not considered in *R v Roberts*. There are, however, many reported decisions of the court which give an indication of what current practice ought to be and it may be used to summarise their general effect.
>
> For rape committed by an adult without any aggravating or mitigating features, a figure of *five years* would be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting points should be *eight years*.
>
> At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls. He represents a more than ordinary danger and a sentence to *15 years or more* may be appropriate.
>
> Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder. And where he is likely, if at large, to remain a danger to women for an indefinite time, *a life sentence* will not be inappropriate.
>
> The crime should in any event be treated as aggravated by any of the following factors:
>
> (1) violence is used over and above the force necessary to commit the rape;
>
> (2) a weapon is used to frighten or wound the victim;
>
> (3) the rape is repeated;
>
> (4) the rape has been carefully planned;
>
> (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual indignities or perversions;
>
> (6) *the victim is either very old* or very young;
>
> (7) the effect on the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.
>
> The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount

of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance.

[40] Richard Malanjum JC (as he then was) in *Hairani bin Sulong*, added another aggravating factor, namely;

... the likely subsequent negative effect of the offence on the victim psychologically, emotionally and socially in relation to the community she belongs to.

[41] In the instant case, it was strongly contested. The victim suffered unnecessary distress after going through an extensive cross-examination. The incident of rapes had affected her emotionally. At one stage in the cross-examination, she was so emotionally affected, so much so the learned deputy could not proceed with her evidence and sought the adjournment the next day (see appeal record at p 36). The aggravating factors in this case may be stated as follows:

(1) the victim was a rubber tapper, an illiterate, a senior citizen aged 63 years;

(2) the rape was committed in a forceful and aggressive manner;

(3) the accused instilled fear on the husband by chasing and threatening to hit him with a big piece of wood. The husband had to run towards the victim to seek refuge as he was old and physically weak;

(4) the accused behaved like a beast raping the victim in the presence of the helpless husband;

(5) the rape was pre-meditated;

(6) the accused had the audacity to attempt a settlement over a crime of rape he committed;

(7) the accused misled the victim by claiming that he (accused) was a Bangladeshi; and

(8) the victim was traumatised by the rape, felt humiliated and broke down while giving evidence and affected her psychologically, emotionally and socially.

A **[42]** As regard sentence, apart from taking the stand that the prosecution is estopped from appealing on insufficiency of sentence, learned counsel did not put forward any mitigating factors. But this court is not unminded the mitigating factors advanced by learned counsel in the court below (see p 74 of the appeal record). Based on those mitigating factors, the aggravating
B factors stated above and I take note the opinion of the learned trial judge who said at the end of her judgment, 'if she had erred, her error was in passing too lenient a sentence on the accused'.

[43] Indeed the sentence was lenient. Based on the facts and all the
C circumstances of this case, I have no qualm the sentence of eight years imprisonment term and two strokes of whipping imposed by the trial judge be set aside. In its place, I substitute it with the imprisonment term of 14 years to run from today and six strokes of whipping.

D *Accused's appeal dismissed. Original sentence substituted with 14 years of imprisonment to commence from date of judgment and six strokes of whipping.*

E Reported by Kohila Nesan

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